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22
23 **UNITED STATES DISTRICT COURT FOR THE
24 NORTHERN DISTRICT OF CALIFORNIA**

25
26 REGENTS OF UNIVERSITY OF
27 CALIFORNIA and JANET NAPOLITANO, in
28 her official capacity as President of the
University of California,

29 Plaintiffs,

30 v.

31 UNITED STATES DEPARTMENT OF
32 HOMELAND SECURITY and ELAINE
33 DUKE, in her official capacity as Acting
34 Secretary of the Department of Homeland
35 Security,

36 Defendants.

37 No. 3:17-cv-05211-WHA
38 No. 3:17-cv-05235-WHA
39 No. 3:17-cv-05329-WHA
40 No. 3:17-cv-05380-WHA
41 No. 3:17-cv-05813-WHA

42
43 **DEFENDANTS' MOTION TO STAY ALL
44 PROCEEDINGS PENDING
45 RESOLUTION OF PETITION FOR WRIT
46 OF MANDAMUS**

47
48 Judge: Honorable William Alsup
49 Hearing: None Requested, or Friday, October
50 20, at 2:00 p.m., or as soon thereafter as
51 counsel may be heard

**NOTICE OF MOTION AND MOTION
FOR STAY PENDING RESOLUTION OF PETITION FOR WRIT OF MANDAMUS**

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, October 20, 2017, at 2:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable William Alsup of the United States District Court for the Northern District of California, in Courtroom 8 on the 19th Floor of the Philip E. Burton Courthouse and Federal Building, 450 Golden Gate Avenue, San Francisco, California, Defendants in the above-captioned matters (hereinafter, "DACA cases") will and hereby move this Court for an Order staying all proceedings in the DACA cases, pending resolution of a petition for writ of mandamus to the United States Court of Appeals for the Ninth Circuit. To expedite the Court's consideration of this request, Defendants are prepared to forego a hearing and have this Court rule on the submitted papers. Alternatively, to the extent the Court decides to hold a hearing, undersigned counsel requests that the Court schedule that hearing after 2 p.m. on Friday afternoon so as to allow undersigned counsel adequate time to make appropriate travel arrangements, or alternatively allow undersigned counsel to appear telephonically.

This motion is made based on Federal Rule of Appellate Procedure 8, which authorizes the District Court to stay an action, order, or judgment, pending resolution of an appeal; this notice of motion; the accompanying memorandum and proposed order; all pleadings and filings in these matters; and such oral argument as the Court allows, if the Court deems oral argument necessary. The parties are concurrently filing a stipulation to expedite consideration of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The United States has been authorized by the Solicitor General to file a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit requesting that the Court of Appeals direct this Court to vacate its Order issued on October 17, 2017, ECF No. 79¹ (hereinafter, “Order”), and to stay discovery and further proceedings concerning the composition

¹ References to docket numbers herein refer to the docket in Case No. 17-cv-05211-WHA. All DACA Cases (Nos. 17-5211, 17-5235, 17-5329, 17-5380, 17-5813)
MOTION FOR STAY PENDING RESULTION OF PETITION FOR WRIT OF MANDAMUS

1 of the administrative record pending a ruling on Defendants' forthcoming motion to dismiss.²
 2 This Court's October 17 Order: 1) requires Defendants to "complete" the administrative record
 3 by adding various materials that are not properly part of an administrative record, to the extent
 4 such a record is even necessary or appropriate in a case in which plaintiffs have raised non-
 5 cognizable claims; 2) requires Defendants to "complete" that record by obtaining materials from
 6 "anywhere in the government," thus raising substantial separation of powers concerns and
 7 imposing undue burdens on Defendants; 3) improperly finds that Defendants have waived the
 8 attorney-client privilege over whether the rescission of the Deferred Action for Childhood
 9 Arrivals policy ("DACA") was lawful; 4) improperly finds, without briefing, that plaintiffs have
 10 overcome Defendants' assertion of deliberative process privilege (and potentially other
 11 privileges) regarding documents identified in Defendants' privilege log (ECF No. 71-2), thus
 12 requiring the disclosure through incorporation into the administrative record of documents that
 13 are covered by the attorney-client privilege, the deliberative process privilege, and/or executive
 14 privilege; and 5) improperly requires the production of a privilege log in association with the
 15 administrative record in this case, even though deliberative and other privileged documents are
 16 not part of a properly constructed administrative record. Moreover, the Court indicated at the
 17 hearing on plaintiffs' motion that it would overrule any objection to the deposition of the Acting
 18 Secretary of Homeland Security, notwithstanding that governing law makes clear that
 19 depositions to probe the decisionmaking process of senior Cabinet-level officials are wholly
 20 improper. Defendants also intend to challenge this Court's order allowing discovery to proceed
 21 over Defendants' objections at the initial Case Management Conference, *see* ECF No. 49,
 22 notwithstanding that this Court has not yet resolved Defendants' forthcoming dispositive motion,
 23 which if successful would result in the dismissal of this litigation without any need for discovery.

24 Defendants' are moving as expeditiously as possible to seek appellate review and will
 25 apply for a writ of mandamus no later than Friday, October 20. In light of this accelerated
 26 schedule, Defendants are seeking a stay of all proceedings now. Moreover, discovery is

27 ² Defendants are seeking a stay of certain proceedings in the DACA cases pending in the United
 28 States District Court for the Eastern District of New York. In the absence of the requested stay,
 the Solicitor General has authorized the filing of a petition for a writ of mandamus in those cases.
See Vidal, et al. v. Baran, et al., No. 16-cv-47756 (NGG) (JO), ECF No. 87.

1 ongoing, with the next (and fifth) deposition in these cases scheduled for Friday, October 20.
 2 Complying with the Court’s Order – which Defendants must and will do in the absence of a stay
 3 – imposes enormous and continuing burdens on Defendants. Accordingly, Defendants also
 4 request IMMEDIATE, EMERGENCY RELIEF of the obligation to provide further witnesses for
 5 depositions and, in the absence of this Court’s immediate provision of such relief, intend to seek
 6 an administrative stay from the Ninth Circuit after 2 p.m. Pacific Daylight Time on Thursday,
 7 October 19, 2017 pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure.

8 **STANDARD FOR SEEKING A STAY**

9 This Court has “inherent power to control the disposition of the causes on its docket [to]
 10 promote economy of time and effort for itself, for counsel, and for [the] litigants” by staying this
 11 matter pending appellate review. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *see*
 12 *also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Filtrol Corp. v. Kelleher*, 467 F.2d 242,
 13 244 (9th Cir. 1972); *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th
 14 Cir. 1983) (“A trial court may, with propriety, find it is efficient for its own docket and the
 15 fairest course for the parties to enter a stay of an action before it, pending resolution of
 16 independent proceedings which bear upon the case.” (citation omitted)).

17 District courts typically apply a four-factor test to determine whether to issue a stay of an
 18 order: (1) the applicant’s likely success on the merits; (2) irreparable injury to the applicant
 19 absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v.*
 20 *Braunskill*, 481 U.S. 770, 776 (1987); *see Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *Leiva-*
 21 *Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (*Nken* requires a showing of irreparable harm,
 22 but applies a balancing test showing “that irreparable harm is probable and either: (a) a strong
 23 likelihood of success on the merits and that the public interest does not weigh heavily against a
 24 stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the
 25 petitioner’s favor”). As explained by the district court in *American Hotel & Lodging Association*
 26 *v. City of Los Angeles*, No. CV 14-09603-AB (SSx), 2015 WL 10791930, at *2 (C.D. Cal. Nov.
 27 5, 2015), however, the four-factor standard applies “specifically to stays of the enforcement of an
 28 order or judgment, not stays of an action during interlocutory appeal.” When seeking to stay

1 proceedings, the relevant test is “whether (1) ‘resolution by the Ninth Circuit of the issue
 2 addressed in [the appealed order] could materially affect this case and advance the ultimate
 3 termination of the litigation’ and (2) whether a stay will ‘promote[] economy of time and effort
 4 for the Court and the parties.’” *Id.* (quotation omitted) (citing *Filtrol*, 467 F.2d at 244). As
 5 described below, Defendants easily meet that standard for a stay of proceedings here: Resolution
 6 of the issues Defendants seek to raise with the Ninth Circuit will materially affect this case and
 7 advance the termination of these lawsuits. At minimum, any guidance the Ninth Circuit may
 8 provide would streamline the resolution of any remaining issues. Even under the more stringent
 9 four-factor test (which applies to a narrower stay of the Court’s Order), however, Defendants
 10 easily meet the standard for a stay.

11 ARGUMENT

12 I. Defendants Have a Strong Likelihood of Success on the Merits.

13 Defendants are likely to succeed on the merits under either the “likelihood of success” or
 14 “substantial case on the merits” standard. *Leiva-Perez*, 640 F.3d at 970. As a threshold matter,
 15 the decision to wind-down DACA is not subject to judicial review at all. *See* Defs.’ Opp. to Pls.’
 16 Mot. to Compel Completion of the Admin. Record at 1 (ECF No. 71) (“Defs.’ Opp.”). Congress
 17 has specifically barred the exercise of jurisdiction by a district court to review the government’s
 18 denial of deferred action, *see* 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-Discrimination Comm.*,
 19 525 U.S. 471, 485 & n.9 (1999), the very action Plaintiffs have brought. And the denial of
 20 deferred action and attendant benefits such as work authorization is in any event committed to
 21 agency discretion by law and unreviewable on that basis as well. Even if the decision were
 22 subject to judicial review, however, Defendants are likely to prevail on their arguments that
 23 discovery, a privilege log, and supplementation of the administrative record are all improper for
 24 the reasons set forth in their opposition brief and at oral argument. *See generally* Defs.’ Opp. at
 25 8-22; Oct. 16, 2017 Hearing Tr (“Hearing Tr.”). The Secretary’s rescission and winding-down
 26 of DACA constitute a statement of policy that does not require a record at all. Defendants
 27 incorporate all of those arguments here.

1 In particular, this Court erred in ordering the “completion” of the administrative record
 2 beyond that which the Defendants had already defined. The Court further erred by requiring the
 3 retrieval of documents from the Department of Justice, which cannot as a matter of law be the
 4 “decisionmaker” for a policy that it did not administer, and from the White House, which is not
 5 subject to the provisions of the Administrative Procedure Act. *See Franklin v. Massachusetts*,
 6 505 U.S. 788, 800–01 (1992) (President’s actions “not reviewable for abuse of discretion under
 7 the APA.” (citation omitted)). Requiring the retrieval of documents from White House officials
 8 effectively imposes discovery burdens upon them, raising substantial separation of powers
 9 concerns as well. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 388 (2004).

10 The Court also erred in holding that deliberative and other privileged documents are
 11 properly part of the administrative record (and in requiring privilege logs in conjunction with any
 12 administrative record); in ordering the incorporation into the administrative record (and, hence,
 13 the public disclosure) of numerous documents identified in Defendants’ privilege log; in finding
 14 that Defendants have waived attorney-client privilege with respect to the legality of DACA; and
 15 in finding that plaintiffs have made a showing sufficient to override Defendants’ assertion of the
 16 deliberative process privilege. Defendants’ documents, such as those protected by the
 17 deliberative process, attorney-client, and work product privileges are not part of the
 18 administrative record. Rather, they reflect the internal giving of advice and deliberations about
 19 the administrative record that will underlie the agency’s decision. Defendants also believe that
 20 the Court has constructively, and improperly, ruled that the Acting Secretary of Homeland
 21 Security should be deposed in this case. *See* Hearing Tr. 32:13-33:8.

22 Notably, a district court here in the Northern District of California recently granted a stay
 23 of the compilation of the administrative record pending mandamus review under similar
 24 circumstances. In that case the district court held that deliberative materials should be included
 25 in the administrative record and should be recorded in a privilege log. *See Order Granting*
 26 *Motion to Compel Completion of the Administrative Record*, *Institute for Fisheries Resources v.*
 27 *Burwell*, No. 16-cv-1574 (N.D. Cal. Jan. 10, 2017). The district court recognized, however, that
 28 a stay was appropriate pending review of the government’s mandamus petition. *See Order*

1 Granting Motion to Stay, *Institute for Fisheries Resources v. Price*, No. 16-cv-1574 (N.D. Cal.,
 2 May 3, 2017). This Court should grant a similar stay here.

3 **II. Defendants Will Be Irreparably Harmed Absent a Stay.**

4 Defendants will suffer immediate, irreparable harm absent a stay. Compliance with the
 5 Order will result in the irretrievable disclosure of privileged documents. Moreover, complying
 6 with the Order will impose enormous burdens and costs on Defendants.

7 The Court has ordered the incorporation of numerous documents identified on
 8 Defendants' privilege log into the Administrative Record, thus resulting in the public disclosure
 9 of those documents. Because the disclosure of those documents cannot be undone, courts
 10 routinely grant stays in such contexts. *See HHS v. Alley*, 129 S. Ct. 1667 (2009) (in FOIA case,
 11 ordering stay of district court's order which directed agency to disclose records to plaintiff,
 12 pending final disposition of appeal, following denial of stay by court of appeals).

13 The harm imposed by the Order is not limited to the disclosure of Defendants' privileged
 14 documents. Orders imposing onerous discovery burdens and significant litigation costs may
 15 cause irreparable harm and justify a stay pending appeal. *See Brown v. Wal-Mart Stores, Inc.*,
 16 No. 09-03339, 2012 WL 5818300, at *4 (N.D. Cal. Nov. 15, 2012) ("Courts evaluate whether
 17 litigation expenses constitute irreparable harm based on the specific circumstances of each case."
 18 (citation omitted)); *Richards v. Ernst & Young LLP*, No. 08-4988, 2012 WL 92738, at *3-4
 19 (N.D. Cal. Jan. 11, 2012) (granting stay because serious burden, including discovery, would be
 20 avoided if defendants won on appeal); *see also Pena v. Taylor Farms Pac., Inc.*, No. 13-1282,
 21 2015 WL 5103157, at *4-5 (E.D. Cal. Aug. 31, 2015) (collecting cases).

22 Here, absent a stay, Defendants will suffer irreparable harm as a result of the staggering
 23 burden that compliance with the Court's Order will impose. First, the Order requires the
 24 completion of the administrative record in a mere ten days from the date of the Order.
 25 Compliance will require that Defendants search for, process, and review documents from a broad
 26 number of individuals within the Department of Homeland Security (including its components),
 27 as well as the Department of Justice and the White House. Defendants have already begun to
 28 take steps to comply with the Order and fully appreciate – and are complying with – the Court's

1 supplemental Order to Compile Supplement Forthwith. *See* ECF No. 80 (“Supplemental
 2 Order”). Nonetheless, complying with both the Order and subsequent Supplemental Order on
 3 the extremely expedited schedule that the Court has provided will only exacerbate the burdens
 4 that Defendants are facing in this litigation.

5 Moreover, Defendants face numerous and immediate discovery obligations in these cases
 6 and the DACA cases pending in the Eastern District of New York. Defendants have already
 7 identified the burdens associated with discovery, at least with respect to DHS. *See* Decl. of Vijai
 8 Chellappa (ECF No. 71-3); Decl. of David J. Palmer (ECF No. 71-4); Decl. of James W.
 9 McCament (ECF No. 71-5); Decl. of Raymond Milani (ECF No. 71-6). To the extent these
 10 lawsuits are not justiciable, or that review should be limited to the administrative record that the
 11 Defendants submitted, none of this discovery would be necessary. But even if some
 12 supplementation of the record or discovery were appropriate, guidance that the Ninth Circuit
 13 would provide regarding the assertion of the attorney-client, work product, and deliberative
 14 process privileges would inform the scope of future discovery. Similarly, this Court has
 15 indicated that it will allow the deposition of the Acting Secretary Duke to proceed. *See* Hearing
 16 Tr. 32:13-33:8. It is indisputable that the deposition of a cabinet official imposes substantial
 17 burdens on the government. *See In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995); *cf. United*
 18 *States v. Morgan*, 313 U.S. 409, 422 (1941) (“the short of the business is that the Secretary
 19 should never have been subjected to this examination”). It would be appropriate to stay that and
 20 similar discovery in order to receive guidance from the Ninth Circuit before imposing these
 21 burdens. And to the extent that or other depositions go forward, they can be more efficiently
 22 conducted after the Ninth Circuit has opined on the privilege issues raised in the Court’s Order.

23 **III. Plaintiffs Will Not Be Prejudiced By a Stay.**

24 The rescission of DACA does not take effect until March 5, which is more than four
 25 months from now. The issues raised by the Court’s Order are substantial, and the harm inflicted
 26 by the Order is irreparable. Moreover, even with a stay, there would be more than sufficient time
 27 for this Court to provide relief to Plaintiffs, to the extent that it concludes that any such relief is
 28 appropriate in light of any guidance that the Ninth Circuit may provide. If anything, having

1 guidance from the Ninth Circuit would allow the parties, and the Court, to more efficiently
2 resolve their outstanding disputes, thus conserving resources.

3 **IV. The Public Interest Favors a Stay.**

4 Discovery in this case has already diverted resources from DHS's mission of protecting
5 the homeland, and the Court's Order will only exacerbate that harm. *See* Chellappa Decl. ¶ 5
6 (CPB "has also fallen behind on an ongoing critical surveillance operation"); Palmer Decl. ¶ 6
7 (DHS HQ has diverted staff from resolving customer issues); McCament Decl. ¶ 6 (USCIS
8 Office of Information Technology has postponed two investigations); Milani Decl. ¶ 7 (ICE has
9 had to devote 1 out of every 14 attorneys to handle discovery). These lawsuits are imposing very
10 real harms on the defendant agencies and, hence, the public that they serve.

11 **CONCLUSION**

12 The Court should stay proceedings until the Court of Appeals rules on the mandamus
13 petition.

14 Dated: October 18, 2017

Respectfully submitted,

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